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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORP., BETHLEHEM STEEL CO., KAISER STEEL CORP.,
Respondents.

Brief of Respondent United States Steel Corporation in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the District Court (R. 780-796; Appendix B to Petition) is reported at 177 F. Supp. 743. The opinion of the Court of Appeals (R. 4158-4191; Appendix A to Petition) is not yet printed in the official reports but will be reported in the Federal Reporter, Second Series, Volume ..... page .....

QUESTIONS PRESENTED

(1) Did the trial court and the Court of Appeals correctly hold that petitioner's evidence failed to establish a prima facie case under Sections 1 and 2 of the Sherman Act?

(2) Did the trial court and the Court of Appeals correctly hold that petitioner's evidence failed to establish a prima facie case under Section 10 of the Clayton Act?

(3) Did the trial court, as the Court of Appeals held, properly rule on the evidence and procedural matters presented by this record?

STATEMENT OF THE CASE

A separate statement of the case is necessary because petitioner's statement bears little resemblance to the facts presented by this case, facts which neither the court below nor the trial court found in any substantial dispute. Because the facts are carefully and thoroughly analyzed in the Court of Appeals' opinion as well as in the opinion of the trial court, we will here set them forth only in brief outline.

Proceedings Below

This is a private antitrust suit for treble damages brought by petitioner, a fabricator of structural steel, against respondents Bethlehem, United States Steel and Kaiser, who were the principal suppliers of steel to petitioner. Petitioner's chief claims are founded on Sections 1 and 2 of the Sherman Act; petitioner claims that respondents conspired in restraint of trade and conspired to monopolize and that each respondent individually monopolized and attempted to monopolize. In addition, petitioner claims that respondent United States Steel violated Section 10 of the Clayton Act. Despite their multiplicity, petitioner's claims all boil down to the same complaint: that during the steel

shortage that existed in the latter part of 1955, respondents Bethlehem, United States Steel and Kaiser failed to furnish petitioner with all the steel it wanted for use on certain fabricating jobs.*

Petitioner brought the present action for a narrow period of time—January 1, 1955 to the date of the filing of the complaint on November 28, 1955 (R. 683). As to matters subsequent to November 28, 1955, petitioner emphasized to the trial court that it intended to bring another and separate suit against respondents and wished to avoid res judicata as to possible damage claims for later periods of time (R. 683-684).

Extensive pretrial discovery was conducted by the parties, during the course of which petitioner stipulated to a list of some 28 fabricating jobs† bid or obtained by petitioner in 1955 on which petitioner claimed difficulty obtaining steel and on which it intended to rely in attempting to prove its case. Respondents accordingly limited their deposition discovery and their inspection of petitioner's records largely to the circumstances of those jobs.

After discovery was completed, a series of comprehensive pretrial conferences was held culminating in a pretrial order (R. 769) defining the issues in substantially the terms petitioner had proposed, incorporating the list of 1955 fabricating jobs on which petitioner predicated its case, limiting—generally along lines to which petitioner itself agreed

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*That there was a critical nationwide steel shortage during the latter half of 1955 certainly is beyond dispute. See Court of Appeals opinion, page 6. Yet the petition completely avoids any mention of this pivotal fact.

†The original list comprised approximately 42 jobs, but at petitioner's request certain of the jobs were eliminated either because petitioner no longer wished to rely on them or because they fell into the post-complaint period of time for which petitioner intended to bring a separate lawsuit (R. 684).

during the pretrial conferences—the number of other similar fabricating jobs that petitioner could bring in as cumulative evidence and making rulings on other matters of evidence that were briefed and argued during the pretrial conferences.

The case then came on for trial before a jury. Early in the trial the court ruled, without objection by any party, that petitioner should present first its evidence on liability, deferring evidence on the damage issue until later in the trial (R. 1305, 1560-1562). Petitioner rested its liability case after about a month of trial, during which petitioner presented testimony from 41 witnesses and introduced numerous documents in evidence. Much of petitioner's evidence was devoted to its steel purchasing problems on specific 1955 fabricating jobs and the steel purchasing problems of other independent fabricators. In addition, petitioner called as witnesses a number of officers and employees of each of the respondents, each of whom testified at length regarding his company's steel distribution policies and practices.

After the close of petitioner's case on liability, respondents moved to dismiss and for a directed verdict. The motions were fully briefed, extensively argued and were granted. As its written opinion shows, the trial court thoroughly and carefully analyzed the evidence, gave petitioner the benefit of every reasonable inference, yet found that petitioner's proof wholly failed to establish a prima facie case. The court could find no substantial conflict of fact; the truth of it was that the undisputed facts showed that petitioner simply had no claim.

On appeal the Court of Appeals likewise scrutinized the record with care, gave petitioner the full benefit of its proof as this Court advised in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), and again

found that the undisputed facts showed that petitioner had no case. As the court stated:

> "After a painstaking review of the voluminous record, consisting of over 4,000 pages of testimony and several hundred exhibits, we are fully satisfied and firmly convinced that plaintiff's entire case comes within the rule approved by the Supreme Court, that 'it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.' *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521, 524 (1925). Accord: *Gunning v. Cooley*, 281 U.S. 90 (1930); *Southern Pac. Co. v. Pool*, 160 U.S. 438 (1896)." (Opinion, page 5.)

Outline of Principal Facts

As a structural steel fabricator, petitioner purchased such steel products as structural shapes, plates and wide-flange beams and fabricated them into various structures such as highway overpasses and buildings. Petitioner purchased from respondents most of the structural steel required for its fabricating activities.

Although primarily producers of basic steel products, each of the respondents also is engaged in structural fabricating, which historically has gone hand in hand with steel production (R. 2673-2675). For example, United States Steel, through its American Bridge facilities, has been a structural fabricator since 1901. In 1948 United States Steel acquired fabricating facilities on the West Coast (see *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948)). However, through the years independent fabricating concerns have occupied an increasingly large share of the market, and the positions of respondents have declined (see, e.g., R. 4977). The great bulk of the basic structural steel

products produced by each respondent is and always has been sold to trade customers, including fabricators such as petitioner (R. 2533, 3999, 4023).

Demand for structural steel products fluctuates considerably from year to year, generally in response to market conditions in the heavy construction industry. The year 1955 saw the start of an unprecedented building boom and thus, despite the enormous increases in steel mill capacity during the decade since World War II (R. 2528, 2532), a critical shortage of structural steel developed in the middle of 1955.

Each of the respondents faced a demand for more steel than it could produce; the problem was to distribute the steel among customers in some reasonable businesslike manner. As petitioner's own purchasing agent acknowledged in his trial testimony, respondents met the problem in varied ways (R. 1419). Kaiser had no over-all distribution policy but reviewed individual orders and attempted to fill the most urgent ones first. Bethlehem at first had no rationing plan either, but later in 1955 adopted customer quotas for certain products manufactured in Bethlehem's Eastern mills based in a general way on purchases by customers in 1953 and 1954. United States Steel, at the outset of the shortage, developed a distribution plan setting up entry limits on its mills for the quantity of steel each customer might order (R. 2514-2515). The entry limits were determined as a matter of business judgment; one obvious factor considered was the amount of steel customers had purchased from United States Steel in the period before the shortage—1953, 1954 and the first six months of 1955 (R. 2615-2616). These entry limits were adjusted as much as possible to fit the specific needs of customers.*

*Of the approximately 24,000 mill customers of United States Steel in 1955 (R. 2533), one-fifth represented new customers taken on in 1954 and 1955 (R. 2600).

Each of the respondents continued to supply steel to its own steel fabricating facilities. The facts on this were developed in great detail at trial; and the evidence was clear that each respondent limited the amount of steel it furnished to its own fabricating facilities. The fabricating divisions or subsidiaries were treated substantially the same as trade customers. Thus United States Steel set up entry limits for its two fabricating divisions, American Bridge Division and Consolidated Western Steel Division. Both divisions complained of the inadequacy of these entry limits (R. 2716-2717, 3308) but received no adjustments. Both divisions operated at far less than capacity in 1955. Consolidated Western, for example, was able to operate at only approximately 30 per cent of capacity (R. 3290), had to decline to bid on many jobs, including at least one large underframe job amounting to 11,000 tons (R. 3292-3294, 4153-4154), and lost numerous other jobs because competitors were able to quote more rapid delivery (R. 4153-4154, 3299-3302).

Petitioner emphasizes the substantial quantities of steel that respondents made available to their own fabricating facilities and argues that this alone shows some sort of discriminatory treatment of petitioner. But as the Court of Appeals observed:

> ". . . isolated figures and unadjusted comparisons cannot support the asserted discriminations, and any illusions that they create are quickly dispelled, for it also appears that defendants' fabricating plants were much larger than the plaintiffs'; they carried on more extensive and varied operations than the plaintiffs' and their individual fabricating capacities were far greater. To illustrate: the 1955 plant capacity of U. S. Steel's Consolidated Western Division, whose receipt of 'huge tonnages' was repeatedly stressed by plaintiff,

> was estimated at 324,000 tons per year. . . . On the other hand, plaintiff's estimated capacity was 15,555 tons." (Opinion, page 9).

Petitioner itself successfully bid on, and actually booked, jobs in 1955 far in excess of its admitted plant capacity. Petitioner bid or quoted on some 174,041 tons of work and secured contracts for 19,733 tons, which was a record high for petitioner (R. 2412, 2416-2417). The bulk of these contracts were secured in the latter part of 1955 after the steel shortage had become acute and after petitioner was well aware that steel was in short supply (R. 1965-1966).

Petitioner then presented numerous orders to each respondent, calling for early delivery of large quantities of steel. Contrary to petitioner's pretrial assertions, the trial evidence showed that the great bulk of the orders was accepted, as each respondent bent every effort to fit the orders into rolling schedules to help petitioner out of its predicament. For example, in cross-examination petitioner's purchasing agent went through each order submitted to Bethlehem on the fabricating jobs petitioner complained about in this case and admitted that the orders were accepted and with a very few minor exceptions were filled by the agreed upon time (R. 2026-2129). United States Steel sold steel to petitioner over and above its entry limits and permitted petitioner to combine entry limits for various types of products in order to obtain larger quantities of items that petitioner needed urgently (R. 1973-1974, 4076). In the last half of 1955, when steel was short, United States Steel shipped 2,766 tons to petitioner (R. 4076) or a yearly average rate of 5,532 tons, more steel than petitioner ever had purchased from United States Steel before (R. 4056-4062).

Petitioner now seeks to single out and isolate its freight car underframe job for Southern Pacific Company as supposedly exemplifying petitioner's steel purchasing difficulties in 1955.* As required by Section 10 of the Clayton Act the job was awarded by Southern Pacific after competitive bidding in October, 1955. Four companies bid, including petitioner and Consolidated Western Steel Division of United States Steel (R. 2864-2866, 4113) and in accordance with Interstate Commerce Commission regulations, Southern Pacific submitted a report to the ICC detailing the basis for the award of the contracts. Petitioner obtained a contract for 500 underframes. This was the largest single contract obtained by petitioner in 1955, amounting to a total of 3,500 tons of steel, was bid at a time when petitioner knew it would have difficulty in obtaining steel and was bid by petitioner at 10 per cent below its estimated cost (R. 1965-1966, 3398-3399).

Approximately 45 per cent of the steel necessary for the underframe job comprised Z-bars, a type of structural shape specifically made for the construction of railroad cars. Although Bethlehem, United States Steel and other companies rolled Z-bars at Eastern mills, petitioner preferred to purchase them from United States Steel, which also rolls Z bars in the West, because these western Z-bars were somewhat less expensive.†

*Petitioner also makes a separate claim as to the underframe job under Section 10 of the Clayton Act, urging that Section 10 imposed a special obligation on respondent United States Steel to furnish petitioner with all the steel it needed for the job over and above petitioner's other steel requirements. We deal with this claim which the trial court and the Court of Appeals found devoid of merit, in the Argument, Part III, *infra*.

†However petitioner actually did purchase some of the Z bars for the job from Bethlehem (R. 1936) and large quantities of other steel needed for the job were purchased from Kaiser (R. 1935).

United States Steel tried to accommodate petitioner by offering to combine petitioner's entry limits for structural shapes and other Western-made steel products so that petitioner would have a larger entry limit for Z-bars. Petitioner refused this offer because it wished to use its entry limits to purchase steel for other jobs which did not require Z-bars (R. 1973-74).* United States Steel went on to furnish petitioner with steel over and above entry limits, and by the end of 1955 had shipped a large enough total tonnage of steel to petitioner to take care of the bulk of the underframe job, even without regard to the steel received by petitioner from other sources.

Thus neither United States Steel nor anyone else deprived petitioner of steel for the underframe job. Steel was made available to petitioner in substantial quantities in a period of shortage and there were no strings whatsoever attached to use of the material; it was, however, up to petitioner and every other fabricator, including the fabricating facilities of respondents, to adopt some reasonable manner of husbanding materials in short supply.

In brief, the evidence showed that a steel shortage developed in mid-1955, that each respondent necessarily had to adopt some method of distributing steel during the shortage, that, in fact, respondents acted independently and followed different steel distribution methods, that respondents

*The tabulation of alleged Z-bar entry limits on page 8 of the petition is inaccurate and misleading. As stated above, United States Steel at no time limited petitioner to 10 tons a month of Z-bars. Representatives of other independent fabricators who bid on the underframe jobs testified that when they bid they were satisfied that they could do the job with the steel available to them (R. 1702-1703, 2737-2738). The tabulation omits two other independent fabricators, ACF Industries, Inc. and Pullman-Standard Car Manufacturing Company, who bid on the underframe jobs and who had *larger* entry limits from United States Steel than did Consolidated Western Division of United States Steel (R. 3983-3984, 2638).

did not discriminate in favor of their own fabricating facilities, that independent fabricators continued to receive the bulk of the steel produced by respondents, and that in particular petitioner was treated fairly by respondents and received substantial quantities of steel from them. Such difficulties as petitioner experienced were due to the record quantity of jobs it booked during the shortage, solely upon the expectation that—at the expense of other fabricators—it could obtain all the steel it wanted.

ARGUMENT

The decision of the court below was clearly correct and raises no novel or important questions meriting review by this Court. Despite petitioner's scattergun citation of allegedly conflicting decisions of this Court and petitioner's random assertions of monopoly and conspiracy, this is simply a case in which petitioner's proof failed to support its claims and in which the court below applied normal and established rules in affirming directed verdicts for respondents. With respect to evidence questions which inevitably arose, as one might expect in a case of this nature, the court below applied well settled law in holding that the evidence was properly excluded by the trial court, or that the exclusion was without prejudicial effect. And as the Court of Appeals emphasizes, much of the so-called "evidence" to which petitioner now refers was not even offered (e.g. Opinion, page 24, n. 22).

The only conceivable respect in which this case differs from the commonplace is that petitioner urges a claim against respondent United States Steel under Section 10 of the Clayton Act, thereby raising the question whether Section 10 will support a private right of action for treble damages. But on the facts here presented, neither the court

below nor the trial court reached that question. Both courts held that *even assuming petitioner could sue under Section 16*, the evidence in this case utterly failed to make out a prima facie case of violation of the statute.

I. The Trial Court and the Court of Appeals Correctly Held that Petitioner's Evidence Failed to Establish a Prima Facie Case that Respondents Conspired in Violation of Sections 1 and 2 of the Sherman Act.

Petitioner's principal claim is that respondents conspired to restrain trade in violation of Section 1 of the Sherman Act or alternatively conspired to monopolize in violation of Section 2 of the Sherman Act. Petitioner does not claim there was any direct evidence of conspiracy. Rather, petitioner argues that an inference of conspiracy can be drawn from evidence of similar conduct. But the trial evidence did not show parallel conduct pointing to conspiracy, but instead affirmatively showed that respondents acted separately and differently, each on the basis of its own independent business judgment.

As we demonstrate in our summary of the facts above, the evidence showed without dispute that faced with a nationwide shortage of structural steel in mid-1955, each respondent was forced to adopt some method of distributing the steel it could manufacture among its customers, whose cumulative demand for steel exceeded productive capacity. Each respondent reacted to the shortage—of necessity—but each followed a different course of action. As petitioner's purchasing agent readily admitted (R. 1419):

> "Well, let me state at this time that 1955 was a very confusing year insofar as allocations, and various mills operated differently; . . ."

And as the court below stated with reference to the distribution methods adopted by each of the respondents, "these

methods do not evidence similarity; their variety strongly suggests individual action." (Opinion, page 7).

Petitioner claimed at the trial that each respondent grossly discriminated against independent fabricators such as petitioner and in favor of respondents' own fabricating facilities. But petitioner's trial evidence exploded any claim of discrimination. As the court below observed:

> ". . . no favoritism is apparent from the record. Defendants' plants were placed under restrictions equivalent to those imposed on the plaintiff. The restrictions were rigorously adhered to, even though they prevented defendants' plants from operating at anywhere near capacity. As a result the defendants were unable to bid or accept a number of jobs because of the scarcity of structural steel." (Opinion, page 9).

Petitioner claimed and still claims (Petition, page 14) that there was "price uniformity" as between respondents. But again petitioner's own evidence contradicted the claim, and showed affirmatively that there were very substantial price *variations* (R. 1457, 1534, 1942-1947, 1999, 3155-3156).

Petitioner claimed and still claims (Petition, pages 14-15) that respondents "traded off" steel and that this is something real competitors don't do. But petitioner's evidence showed no more than that for perfectly normal business reasons, respondents on occasion sold steel to one another (R. 1583-1589, 1622-1625, 3987, 3999, 4001-4004). Indeed, petitioner's purchasing agent admitted that petitioner itself had purchase and sale transactions with other local fabricators and that this was a "common practice." (R. 1920-1921).

Finally, petitioner claimed at trial and still claims that respondents do not compete in certain areas and "allocated certain lines to themselves and seem to be rather careful not to step on each other's toes." (Petition, pages 15-16).

Here again petitioner's assertions are without supporting facts. It certainly is true that United States Steel has warehouse facilities while Kaiser and Bethlehem have not, Bethlehem has ship building activities but United States Steel and Kaiser have not, and so forth. But there is absolutely no evidence, and petitioner points to none, that this business diversity was conspiratorial or anything but another example of what the facts show throughout this case: that each respondent at all times has acted independently in exercise of its own business judgment.

The court below and the trial court both correctly determined that after giving petitioner the benefit of every favorable inference which could be drawn from the evidence, there still was no fair or reasonable inference of conspiracy here, and that under well established law respondents were entitled to a directed verdict (Court of Appeals Opinion, pages 5-10; R. 793-794).

Petitioner complains that the court below failed to follow the admonition of this court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) that: "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." In the sense that many of petitioner's assertions are, as we demonstrate above, disjointed and without any evident pertinency to any issue in the case, it is difficult to do anything but take the assertions up one by one. Nevertheless, it is abundantly clear that the court below not only said it was following *Continental Ore* (Opinion, page 5), but in fact did so. The court's opinion shows a careful consideration of the entire record as a whole, indeed a penetrating search for some possible favorable inference that might have given petitioner a prima facie case. But the inference was not there.

II. The Trial Court and the Court of Appeals Correctly Held that Petitioner's Evidence Failed to Establish a Prima Facie Case that Respondents Individually Monopolized or Attempted to Monopolize in Violation of Section 2 of the Sherman Act.

Again and again petitioner uses the words "monopoly" and "attempts to monopolize". Aside from its use of the terms as pure invective, petitioner evidently seeks to charge respondents *individually* with illegal monopolization and attempts to monopolize in violation of Section 2 of the Sherman Act. Thus petitioner argues that the evidence shows that United States Steel attempted to monopolize "the fabrication of railway car underframes" and that Bethlehem attempted to monopolize "the fabrication of multi-story buildings" (Petition, pages 24-25). The court below correctly held that petitioner's monopoly charges were wholly without substance (Opinion, pages 15-16).

The offense of individual monopolization under Section 2 of the Sherman Act requires as a minimum that the enterprise charged with monopolization must have attained "monopoly power" in an economically distinct market. *United States v. DuPont*, 351 U.S. 377, 389 (1956); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-613 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510 (1948). In the present case—despite petitioner's unsupported argumentative assertions—there was no evidence to show what constituted the total market for structural steel or structural fabricating in the Western states. There was no evidence to show the share of any respondent in any such Western market. There was no evidence to suggest that the position of any respondent was increasing. On the contrary, the only record evidence on the subject indicated that over the years the share of United States Steel and the share of Bethlehem in structural fabricating had substantially declined, that numerous new companies had entered the struc-

tural fabricating field and that other fabricators had taken an increasing share of the market (R. 4023, 4077-4078).

Taken as a whole, the evidence denied the existence of anything like individual monopolization by any respondent.

Turning to the claim that each respondent individually *attempted* to monopolize, it is well established that such alleged offense requires a showing of *specific intent* coupled with the *dangerous probability that monopoly will be accomplished*. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *United States v. Griffith*, 334 U.S. 100, 105-106 (1948).

Where it appears that a defendant's actions have been "predominantly motivated by legitimate business aims," there is no adequate showing of intent. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-627 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 533 (1948).

In its strained effort to twist its claim into an attempt to monopolize, petitioner argues, among other things, that there was evidence that United States Steel attempted to monopolize "the fabrication of railway car underframes" (Petition, page 24). The facts belie the charge. The evidence showed that Southern Pacific Company, in compliance with statute and Interstate Commerce Commission regulations, awarded a number of underframe contracts to Consolidated Western Steel Division of United States Steel because it submitted the most favorable bids and awarded another contract to petitioner for the same reason.* Concurrently, Southern Pacific awarded contracts for complete railway cars, including underframes, to ACF Industries, Inc., Pullman-Standard Car Manufacturing Company and

*Further facts regarding the Southern Pacific underframe jobs are set forth in point III of the Argument, *infra*.

other fabricators (R. 2888-2890). Southern Pacific's decision whether to buy complete cars or to buy underframes and assemble the cars itself depended upon relative cost and other factors (R. 2889). Southern Pacific Company, of course, was not the only railroad that was buying underframes or complete cars (R. 3296). The record does not indicate the extent of this business. But it does establish that in November, 1955 Consolidated Western Steel Division of United States Steel had to decline for lack of steel the opportunity to bid on 11,000 tons of underframes for Union Pacific Railroad (R. 3294-3295).

Thus, even assuming that railroad car fabricating is a business separate and distinct from other steel fabricating (an assumption not supported by the record), the facts fail to show United States Steel's position in that business — much less that any monopoly was "dangerously probable." Nor was there any evidence whatsoever of intent to monopolize or that United States Steel's conduct was actuated by anything other than normal business motives.

In summary, petitioner's monopoly claims, like the remainder of its case, proved to be mere accusatory generalities unsupported by fact or law.

III. The Trial Court and the Court of Appeals Correctly Held that Petitioner's Evidence Failed to Establish a Prima Facie Case that Respondent United States Steel Violated Section 10 of the Clayton Act.

Petitioner makes a separate claim under Section 10 of the Clayton Act (15 U.S.C. § 20) against respondent United States Steel. The gist of petitioner's claim is that Section 10 required United States Steel to supply petitioner (or any other competitive bidder) with all the steel necessary for the fabrication of railroad car underframes for Southern Pacific Company, and that unwillingness to supply peti-

manner with all steel wanted, when wanted, constituted a violation of Section 10.

Respondent United States Steel argued to the trial court that Section 10 would not support a private right of action because the administration of the statute is committed exclusively to the Interstate Commerce Commission, and the statute provides solely for criminal sanctions in proceedings to be brought by the Attorney General after investigation by the ICC. The trial court never reached that question, holding instead that the evidence failed to show a violation of the statute (R. 794-796). On appeal, the court below, also without expressing an opinion on whether a private suit could be brought under Section 10, held that the evidence showed no violation (Opinion, pages 17-18).

We submit that the decisions of the courts below as to petitioner's Section 10 claim are correct and raise no substantial question.

A. Section 10 of the Clayton Act Required that Southern Pacific Company Conduct Competitive Bidding on the Underframe Contracts and the Evidence Showed that the Bidding Was Conducted in Accordance with the Law.

Section 10 of the Clayton Act (15 U.S.C. § 20),* makes it unlawful for a common carrier to purchase from a corporation with which it has a director in common, unless the pur-

*In full text this section is as follows:

"No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be

chase is made pursuant to competitive bidding and the "most favorable" bid is accepted. The section goes on to provide criminal penalties for any one who does any act "to prevent free and fair competition among the bidders or those desiring to bid . . ." The Interstate Commerce Commission has adopted detailed regulations covering the bidding procedures and the acceptance of bids. The carrier must make a report to the ICC on each transaction. 49 Code of Federal Regulations, Part 8.

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made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

"Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

"Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

"If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court. (Oct. 15, 1914, c. 323, § 10, 38 Stat. 734.)

The obvious purpose of Section 10 is to require competitive bidding when there is an interlocking director and thus insure that the carrier will get the best terms available. As this Court recently stated, Section 10 was enacted:

> "to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest."

Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173, 190 (1959).

In the present case there is no question but that Southern Pacific Company was required on the underframe jobs to follow the competitive bidding procedures set forth in Section 10 and the pertinent ICC regulations. Consolidated Western Steel Division of United States Steel was a bidder on the jobs, and Mr. James B. Black was a director both of Southern Pacific Company and United States Steel.*

The evidence showed without dispute that Southern Pacific, in fact, did conduct competitive bidding and followed the applicable regulations without granting any favors to any bidders. Mr. M. C. Nystrom, Southern Pacific's general purchasing agent, testified at length as to each of the underframe contracts awarded by Southern Pacific from 1953 through 1955 (R. 2812 et seq.) and the pertinent documents from the files maintained by Southern Pacific on the jobs were introduced in evidence (e.g. R. 4113-4140).

During the period involved in this suit, there were four instances in which Southern Pacific received bids on car

*However, petitioner does not claim, nor does the evidence show, that Mr. Black had any personal interest in the underframe jobs or had anything to do with them (R. 2901).

underframes. The underframes were for delivery to Southern Pacific's Sacramento shops, where Southern Pacific itself planned to use the underframes in assembling complete railroad cars.* On the first two calls for bids—in early 1955, when steel was still in relatively plentiful supply—bids were received from several fabricators and the contracts were awarded to Consolidated Western Steel Division of United States Steel, as having submitted the most favorable bids. The reasons for each award were set forth in full in Southern Pacific's reports to the ICC (R. 2829-2832, 2914-2919, 4083). On the third call for bids, after bids from five fabricators were received for 1900 car frames, Southern Pacific elected to reject all the bids and call for bids on 1,500 car frames because its requirements had increased (R. 2833-2834, 2842, 2919). ICC regulations required a rejection and a new call for bids where there was any increase or decrease in the total quantity to be contracted for; such a rejection was not at all unusual (R. 2896, 2898-2899). On the fourth call for bids, there were four fabricators bidding, and Consolidated Western Division's bid was low, but Southern Pacific split the contract and awarded 500 underframes to petitioner and the remainder to Consolidated Western in order to have at least two sources of supply (R. 2864-2866). Again, the reasons for the award were set forth in a report to the ICC (R. 4113).

The facts as to the bidding procedures on each of the calls for bids were fully explored at trial. There was no evidence—and petitioner points to none—that the bidding was not conducted in strict accordance with law or that the bids accepted were not the most favorable to Southern Pacific. This should be dispositive of petitioner's claim under Sec-

*Concurrently, Southern Pacific also was purchasing complete cars from ACF Industries, Pullman-Standard Car Manufacturing Company, and other car builders (R. 2888-2890).

tion 10 of the Clayton Act, for everything the law requires was done and nothing in the record supports any claim that United States Steel committed any impropriety whatsoever in connection with the bidding. But petitioner further argues that respondent United States Steel's steel distribution policies, which petitioner claims deprived it of steel for the underframes, constituted a violation of Section 10. We deal next with this contention, which the courts below properly found was contrary to law and fact.

B. The Evidence Failed to Show that United States Steel's Distribution Practices in Any Way Violated Section 10 of the Clayton Act.

As we have demonstrated, petitioner booked a record total of 19,733 tons of fabricating work in 1955 (R. 2412, 2417). Petitioner's car underframe job for Southern Pacific was booked by petitioner in late fall and at the height of the nationwide steel shortage. Petitioner obtained a substantial quantity of steel for the job from Kaiser and Bethlehem (R. 1935-1936) but preferred to purchase the bulk of the necessary Z-bars from United States Steel, because it was the most economical source (R. 1533-1534).

Neither United States Steel nor any other steel company was able to accept all the orders tendered by customers in the latter part of 1955; demand exceeded productive capacity (R. 2145, 2169-2170, 2513, 3053-3064, 4010-4014). In an effort to distribute in a reasonable manner the steel it could manufacture, United States Steel had adopted entry limits for its customers and the record shows unequivocally that these entry limits were determined without regard to whether customers bid or did not bid against United States Steel's fabricating facilities (R. 2619-2620, 2631, 3014, 3413-3414). Petitioner wanted Z-bars for the underframe contract, and United States Steel offered to let petitioner

combine its entire entry limits for various Western steel products and apply them to Z-bars (R. 1973-1974). Petitioner refused, because it wanted to use the steel for other jobs which did not require Z-bars (ibid). United States Steel went ahead and furnished petitioner with steel over and above entry limits (R. 4076) and petitioner obtained steel from other sources (R. 4056-4062, 4018-4019, 4029-4030) amounting in total to much more than enough to handle the underframes. It was petitioner's own business how the steel was used, but petitioner chose to use the bulk of the steel on other jobs rather than for the fabrication of underframes for Southern Pacific.

It is in the face of this evidence that petitioner claims it was deprived of steel for underframes and that respondent United States Steel's steel distribution practices operated to "prevent free and fair competition" on the underframes in violation of Section 10 of the Clayton Act. In other words, petitioner isolates the underframes and asserts that regardless of anything else—petitioner was entitled to preferential treatment on those. The necessary thrust of petitioner's claim thus is that under the circumstances of this case, Section 10 required United States Steel, as a condition of bidding on the underframe jobs, to guarantee steel to any and all competitors who might wish to bid regardless of where they might be located, what their other sources of steel might be and how much other steel they already were using on other jobs, and even regardless of whether they could or would pay for the steel. This indeed would be a tortured construction of Section 10. As the Court of Appeals put it, such a construction of Section 10 "would engraft on the section the additional condition of cooperation between bidders." (Opinion, page 18). Neither the statute nor the regulations implementing it anywhere

contain provisions suggesting any obligations on the part of a supplier to deal with competing suppliers, to extend favors to them or to refrain from doing something in the normal course of business that somehow might hamper them. Nor do any of the reported decisions referring to Section 10* hold or even hint that such a construction would find any support in the statute or would be consistent with the purposes for which it was adopted.

We submit that the courts below properly held that petitioner's evidence utterly failed to establish any violation of Section 10 of the Clayton Act by respondent United States Steel.

IV. Rulings on Matters of Evidence and Procedure by the Trial Court Were Properly Affirmed by the Court Below.

Petitioner complains of a number of rulings by the trial court on matters of evidence and procedure, all of which were carefully reviewed and affirmed by the court below on appeal. Despite petitioner's wholly unwarranted characterization of these rulings as "compartmentalizing" the proof,

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Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173 (1959), affirming, 165 F. Supp. 893 (D. Minn. 1958), upholding Commission's order in *Toledo, Peoria & Western R.R. Co. Control*, 295 ICC 523 (1957); *Beegle v. Thomson*, 138 F.2d 875 (7th Cir. 1943); *In re Missouri Pac. R. Co.*, 13 F. Supp. 888 (E. D. Mo. 1935); *Regulations Relative to Bids of Carriers—Ex Parte No. 54*, 56 ICC 847 (1920); *Western Maryland Equipment Trust*, 111 ICC 434 (1926); *Automatic Train-Control Devices*, 112 ICC 259 (1926); *Construction and Repair of Railway Equipment*, 128 ICC 323 (1927); *Motor Bus and Motor Truck Operation*, 140 ICC 685, 733 (1928); *Securities of Western Pacific R. Co.*, 145 ICC 750 (1928); *Securities of Virginia Central Railway*, 154 ICC 437 (1929); *Codman v. Boston & Maine Railroad*, 157 ICC 552 (1929); *Greyhound Securities*, 25 MCC 365 (1939); *Pennsylvania, Ohio & Detroit R. Co. Bonds*, 254 ICC 473 (1943); *Wheeling & Lake Erie Ry. Co. Control*, 254 ICC 505 (1943); *Investigation of Practices of Norfolk S. Ry Co.*, 291 ICC 575, 628 (1954).

none of the rulings raises any important question, and none had any impact on the outcome of the case.

A. Petitioner's Assertions as to the Exclusion of Evidence Outside the Period Involved in this Suit Present No Question of Substance.

As we have demonstrated, petitioner brought this case for a narrow time period, from January 1, 1955 to November 28, 1955. Petitioner had released respondents Bethlehem and United States Steel from any claim petitioner might have had prior to January 1, 1955 and petitioner many times expressly stated that it had no claim against respondent Kaiser for matters occurring before 1955. Petitioner also indicated its wish to preserve its right to file a separate lawsuit for matters occurring after November 28, 1955. On the eve of trial petitioner shifted its position and sought to file a supplemental complaint bringing its claims up to date on certain specific fabricating jobs, but because the motion was tardy and concerned matters as to which respondents had not had discovery, the trial court in its discretion denied the motion (R. 773).

Thus at the trial the parties were concerned with matters occurring in 1955. But in addition, the court admitted pre-1955 evidence relating, among other things, to fabricating jobs prior to 1955 and to respondents' steel distribution practices and structural fabricating activities prior to 1955. Other pre-1955 evidence related to the purchases of steel by petitioner and other fabricators on specific jobs in the earlier years. Petitioner itself suggested that such cumulative evidence be limited to instances from 1950 on (R. 1206-1207) and to the local area (R. 1201); and voluntarily limited its list of individual instances to 9 jobs (R. 530-531). In the face of the cumulative and time-consuming exploration of collateral matters which all those jobs entailed, the trial court designated for trial purposes two representative jobs

on which petitioner had laid great emphasis (R. 777).* In so ruling, however, the court did not foreclose proof at trial of other jobs, provided petitioner could show relevancy and the need therefor (R. 1251-1252). No such showing ever was attempted.

Now petitioner belatedly argues that more of this evidence as to pre-1955 jobs should have been admitted, citing three additional jobs (Petition, pages 41-43). But even taking petitioner's description of the jobs at face value, they would have been nothing but collateral evidence calculated only to prolong the trial.

Petitioner's argument as to post-1955 evidence (Petition, pages 44-45), is even more obscure. The petition does not disclose what post-1955 evidence petitioner might have wanted to introduce. Nor did petitioner at the pretrial conferences or the trial ever make this clear, despite repeated suggestions from the trial court (e.g. R. 2360, 2362) that if petitioner wished to introduce certain evidence it should make definite unequivocal offers of proof, so that the court might have something concrete on which to rule. Admittedly, the trial transcript is replete with colloquy between court and counsel regarding the handling of the evidence as to the 30 or so fabricating jobs on which petitioner primarily relied to establish its case. In a general way petitioner indicated its desire to trace through certain of the jobs to their post-1955 conclusion in the attempt to show continued difficulties in purchasing steel and to show that petitioner sustained losses on some of the jobs. But petitioner's explanation for the possible relevancy of this sort of evidence was that it would bear on the issue of

*Despite petitioner's early dramatic claims for the pre-1955 jobs designated by the trial court (see R. 726, 735), the evidence as to these jobs was wholly anti-climactic and gave no support to petitioner's case. (See Opinion, page 19, footnote 18.)

damages (R. 921, 947, 1289-1290, 1559, 2878, 3543-3544). Thus, as the Court of Appeals properly held (Opinion, page 26), even if there had been an adequate offer of proof as to post-1955 evidence—which there was not—the offer was "limited to the damage issue, an issue never reached at the trial."*

B. The Industry Advisory Committee Documents Were Properly Excluded.

Petitioner argues at pages 38-41 of its petition that the trial court erroneously excluded the depositions of Houston (R. 3786), Halcomb (R. 3804) and Small (R. 3832) and certain "minutes" of a meeting of an industry advisory committee toward the end of World War II. Petitioner's treatment of this point is confusing and misleading in the extreme. The depositions never were offered in evidence, never were excluded by any pretrial order, or otherwise, and a reading of the depositions shows that petitioner never would have had the slightest desire to offer them in evidence, for they specifically disprove the very assertions that petitioner makes regarding the meeting of the industry advisory committee and an alleged statement at the meeting regarding a "voluntary allocation system" (e.g. R. 3825, 3856).

Petitioner, in fact, did seek to introduce the "minutes" or summary of the meeting and the trial court ruled that the document was inadmissible (R. 773).† Petitioner implies that the document was held inadmissible because it predated 1955. While the document certainly was remote

*Petitioner faced particular difficulty on the damage phase of its case, because its operations in 1955 concededly were profitable (R. 768-769).

†The minutes were not designated by petitioner as part of the record on appeal. However, rather than disregard petitioner's point on the appeal, the court below did inspect the document in the clerk's files (Opinion, page 22).

in time, the basic objection to it was that it was *inadmissible hearsay*: It was unsigned, there was nothing to show who prepared it; or when, or how, or whether the person who prepared it had personal knowledge of any of the matters stated therein. Under long settled authority, the court below held that the document properly had been excluded as hearsay (Opinion, pages 23-24).

C. The Testimony of Economists Was Not Excluded.

Several pages of the petition are devoted to a labored argument that the trial court improperly excluded testimony of economists (Petition, pages 27-31), a matter that was not raised at any time during the pretrial conferences or at the trial. A few months after this action was commenced, petitioner took the deposition of Dr. Theodore Kreps, an economist. Petitioner's counsel conceded that Dr. Kreps had no expert knowledge of the steel industry (R. 858). His deposition (R. 3547) consisted of generalizations on economic theory, assertions as to what "monopoly" and "competition" are, and the like. The deposition was ordered stricken by a judge other than the one who tried the case some three years later.

The order striking the deposition (R. 287), while expressing a distinct lack of enthusiasm for testimony as to "economic theories", specifically leaves open the possibility that an economist might properly testify at the trial. Yet petitioner never brought the matter of Dr. Kreps or any other economist up again—until the appeal. Nor does petitioner even now explain how the testimony of an economist would have made any difference here, except to suggest that as petitioner's witness, the economist might have invaded the province of judge and jury and given his opinion on the ultimate issues in the case (Petition, page 31).

Plainly, the court below was correct in holding that there was no erroneous exclusion of economic testimony.

D. Petitioner's Motion to File a Third Amended and Supplemental Complaint Was Properly Denied.

Petitioner's argument that it should have been permitted to file a third amended and supplemental complaint merits little comment.

The proposed third amended and supplemental complaint (R. 703) tacked on an additional four years of alleged wrong-doing by respondents, and purported to bring petitioner's damage claims up to the date of trial, at least on certain specific jobs. Even though the case had been pending for almost four years, petitioner did not move to file the supplemental complaint until shortly before trial and after discovery by the parties had been completed on pleadings pertaining to matters occurring during 1955. But in arguing the motion to file, petitioner's counsel stressed that petitioner wished to proceed to trial without postponing the matter to allow any additional discovery (R. 1165).

Petitioner's motion to file the third amended and supplemental complaint was clearly and inexcusably tardy. Permitting the complaint to be filed would have been seriously prejudicial in that respondents would have had no opportunity for discovery or trial preparation on the new issues opened up by the complaint. The trial court—as the court below held—was well within its discretion in denying the motion to file.

E. The Matter of Costs Was Properly Determined by the Courts Below.

The matter of costs is treated fully in the Court of Appeals' opinion (Opinion, pages 28-34) and presents no question worthy of review by this Court.

CONCLUSION

The decision below was correct, announces no new or important principles of law, and creates no conflict with any decisions of other circuits or this Court. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California, October 14, 1963.

Respectfully submitted,

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